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IN THE
Supreme Court of the United States
OCTOBER TERM, 1971

NO. 70-40

MARY DOE; Peter G. Bourne; Robert Hatcher; Lillas L. James; James Waters; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Susanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver; residents of the State of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,

Appellants,

VS.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; Lewis R. Slaton, as District Attorney of Fulton County, Georgia; and Herbert T. Jenkins, as Chief of Police of the City of Atlanta,

Appellees.

**On Appeal from the United States District Court
For the Northern District of Georgia**

BRIEF OF THE APPELLANTS

Attorneys for Appellants: Of Counsel:

MARGIE PITTS HAMES
Suite 822, 15 Peachtree St., N.E.
Atlanta, Georgia 30303

ELIZABETH ROEDIGER RINDSKOPF
GALE M. SIEGEL
185 Central Avenue, S.W.
Atlanta, Georgia 30303

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
American Civil Liberties Union
Foundation, Inc.
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

TOBIANE SCHWARTZ
153 Pryor Street, S.W.
Atlanta, Georgia 30303

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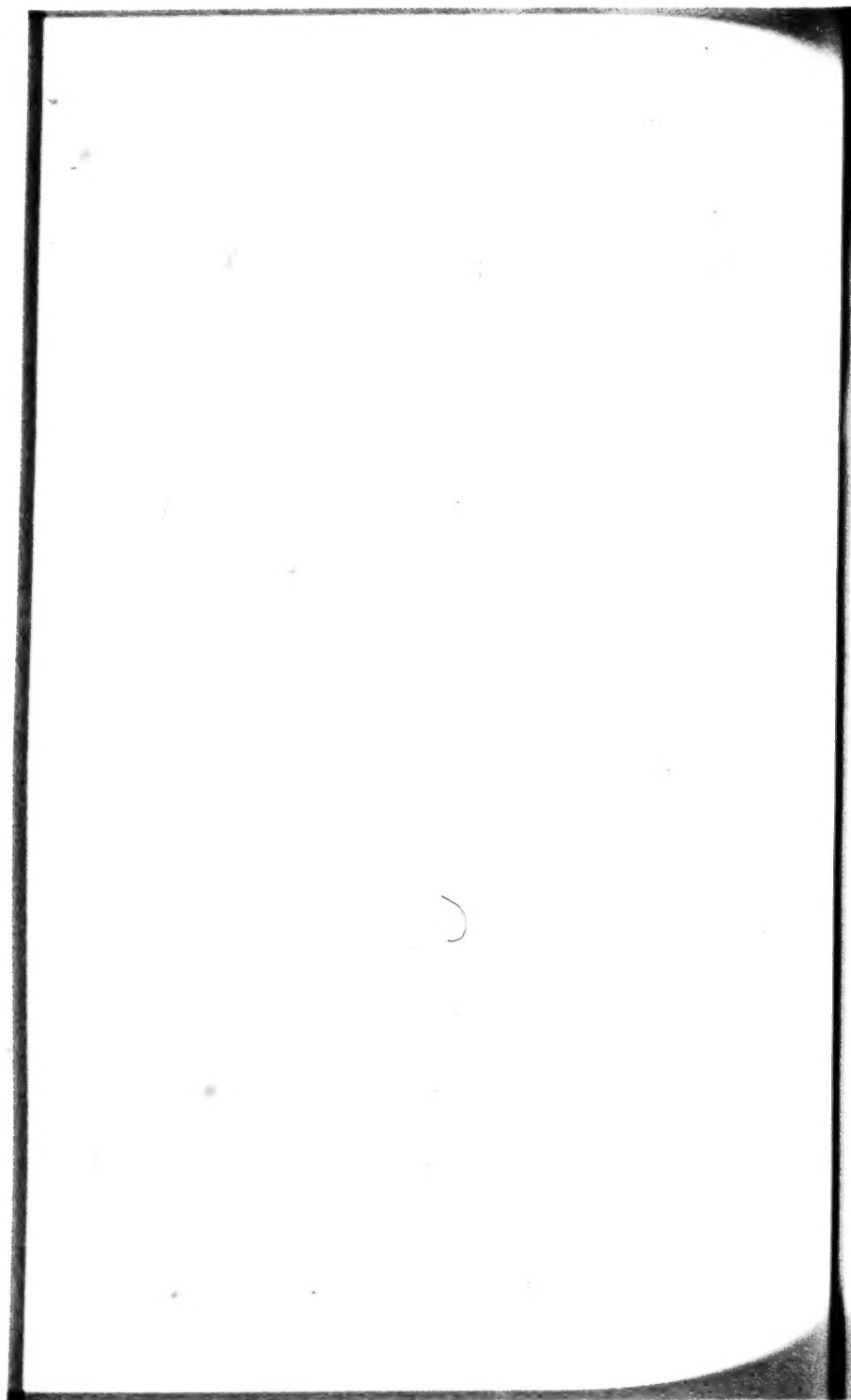
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**On Appeal from the United States District Court
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Filed November 14, 1970
Jurisdiction Postponed May 3, 1971

BRIEF OF THE APPELLANTS

OPINIONS BELOW

The decision in this case was rendered July 31, 1970 and is reported as *Mary Doe, et al, v. Arthur K. Bolton, et al*, 319 F. Supp. 1048 (N.D. Ga. 1970) (A. 71-86). A supplemental opinion was issued October 13, 1970, and is reported at 319 F. Supp. 1057 (N.D. Ga. 1970) (A. 161-164).

JURISDICTION

This Court has jurisdiction by direct appeal to review the decision below because this is an "appeal . . . from an order denying . . . an interlocutory or permanent injunction. . . ." 28 U.S.C. § 1253. The action was brought under the first, ninth and fourteenth amendments to the Constitution of the United States and 42 U.S.C. § 1983. Jurisdiction of the district court was conferred by 28 U.S.C. §§ 1343, 2201, 2202, 2281 and 2284.

Appellants brought this class action on April 16, 1970, seeking a declaratory judgment that the Georgia abortion statute, *Ga. Code* §§ 26-1202 *et seq.*, was unconstitutional and seeking injunctive relief against its enforcement. A Motion for Temporary Restraining Order was denied on May 4, 1970. A statutory three-judge district court was convened and heard oral argument on June 15, 1970. By opinion dated July 31, 1970, judgment dated August 24, 1970, and amended opinion dated October 13, 1970, portions of *Ga. Code* § 1202 were declared unconstitutional. The court, however, refused to enjoin future enforcement of said Code sections. In its original opinion, judgment, and amended opinion the court denied declaratory and injunctive relief as to the remainder of said statute, holding it to be a valid exercise of state authority; additionally, the

district court granted a motion to dismiss all plaintiffs except Mary Doe, thereby denying any declaratory and injunctive relief to doctors, nurses, social workers, ministers, and counsellors. This appeal is from the denial of injunctive relief and denial of relief from the remainder of the statute and to the dismissed plaintiffs. Notice of Appeal was filed in the United States District Court for the Northern District of Georgia on September 18, 1970. An Amended Notice of Appeal was filed November 3, 1970.

STATUTE INVOLVED

The statute in question is *Ga. Code* §§ 26-1201-03, hereafter referred to as the Georgia abortion statute. The statute is set forth below; those sections declared unconstitutional by the district court are italicized.

Ga. Code § 26-1201. Criminal Abortion

Except as otherwise provided in Section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion. (Acts 1968, pp. 1249, 1277.)

26-1202. Exception

(a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary because:

(1) *A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or*

(2) *The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or*

(3) *The pregnancy resulted from forcible or statutory rape.*

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission

on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) *If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made to any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.*

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to Paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) *Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior*

court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26-1203. Punishment

A person convicted of criminal abortion shall be pun-

ished by imprisonment for not less than one nor more than 10 years. (Acts 1968, pp. 1249-1280.)

QUESTIONS PRESENTED

1. Whether the claim of the unconstitutionality of the Georgia abortion statute made by appellant physicians, nurses, social workers, ministers, and family planning and abortion counselling organizations presents a justiciable case or controversy.

2. Whether the provisions of the Georgia abortion statute, as to which the district court refused declaratory relief, deny appellants due process of law in one or more of the following respects:

(a) by being so vague and ambiguous as to give no guidance by which proscribed conduct may be judged,

(b) by denying an abortion applicant an opportunity to be heard by the statutory hospital abortion committee, to know the reasons on which such committee bases an adverse decision, or to appeal an adverse decision,

(c) by creating a procedure so cumbersome, time consuming, and restrictive as to manipulate out of existence the rights of an abortion applicant,

(d) by unreasonably infringing upon the right of non-residents to freely travel to Georgia through the statutory limitation that legal therapeutic abortions be performed only on Georgia residents, and

(e) by denying physicians the "liberty" and "property" to practice their professions free from unreasonable state interference.

3. Whether the procedural requirements and restrictions of the Georgia abortion statute result in a denial

of equal protection of the law to poor, rural, and Negro citizens.

4. Whether the district court should have enjoined future enforcement of those provisions of the Georgia abortion statute which it declared unconstitutional in the absence of a pending state criminal prosecution.

STATEMENT OF THE CASE

The facts set forth herein are taken from the complaint (unless otherwise specified) which was taken as true (A. 87). The court allowed this action to be prosecuted in the fictitious name of Mary Doe so as to avoid embarrassment to the plaintiff.

Mary Doe was a 22 year old woman who was approximately eleven weeks pregnant at the time the complaint was filed in this case. Mrs. Doe and her husband were unemployed, their marriage had been unstable, and during the pendency of this suit, her husband abandoned her. Mrs. Doe sought to terminate her pregnancy because she was emotionally and economically unable to care for and support another child. She is the mother of three other children; her third child was placed with adoptive parents at birth and the other two children were removed from her custody by state authorities because of her inability to care for them.

Mrs. Doe applied for an abortion at Grady Memorial Hospital in Atlanta. After a period of twenty-five days, she was notified that her application had been denied by the hospital's abortion committee because she did not come within one of the three reasons specified in the Georgia abortion statute. This class action was filed in the United States District Court on April 16, 1970,

seeking injunctive and declaratory relief based on the unconstitutionality of the statute. Mrs. Doe's application for temporary relief was denied by order dated May 4, 1970. A subsequent application for an abortion through private physicians to a private hospital was approved, but Mrs. Doe did not have funds with which to pay her hospital bill in advance so she was unable to obtain an abortion at the private hospital. (Answers to interrogatories A. 63-64). Also, she was financially unable to travel to some other state which has less restrictive interpretation of abortion limitations. Her remaining alternatives were to continue her pregnancy or risk her life and health at the hands of a non-medical criminal abortionist.

Appellant-physicians who are obstetricians, gynecologists, psychiatrists, medical school professors, and general practitioners of medicine, brought this action on their behalf and on behalf of members of their profession, seeking to declare the statute an unconstitutional infringement on the practice of their profession and the physician-patient relationship, and further asserted the statute unconstitutionally vague in violation of due process requirements. Appellant-physicians are regularly called upon by their patients to perform or arrange for medically induced abortions. Appellants desired to perform or arrange this medical service for their patients, but felt constrained from doing so because of the lack of clarity of the Georgia abortion statute, its criminal sanctions against abortions not authorized by its terms, and the related threat of revocation or suspension of their license to practice medicine.

Defendants below raised the issue of "standing" and "justiciability" of the controversy as to the physicians,

nurses, ministers, social workers, and organizations. The court found that all plaintiffs had standing, but that only Mary Doe had sufficient "collision of interest" to present a justiciable controversy.

As to the merits of Mary Doe's class action, the three-judge court held that "the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy." (A. 81). The court ruled that "reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control . . ." (A. 84). Thus, the portion of the statute which allowed only three reasons for abortion (impairment of health of the woman, rape, or fetal malformation) was declared unconstitutional but the remainder of the statute was declared to be a "proper exercise of state power." The remainder of the statute is basically the procedural steps for obtaining an abortion and provisions as to who can perform abortions and where abortions may be performed.

Appellants assert here that the statute as revised by the court below remains as a barrier to the constitutional rights asserted and will obstruct and interfere with such rights unless declaratory and injunctive relief is granted.

SUMMARY OF THE ARGUMENT

I. JURISDICTION OF THIS COURT.

A. Appellants argue that 28 U.S.C. § 1253 gives the party aggrieved by the denial of a prayed for injunction, in a civil action required to be heard by a district court of three judges, a right of direct appeal to the

Supreme Court and that these jurisdictional requisites are met in this case. A three judge court was convened to consider the alleged unconstitutionality of a statute of statewide applicability and, while it granted a judgment declaring portions of the statute unconstitutional, it sustained the balance and denied all injunctive relief.

B. The justiciability of the claim asserted by Mary Doe lies in the fact that she was denied an abortion by reason of the Georgia abortion statute. Although Mary Doe's physician and two concurring physicians advised an abortion as the best medical treatment for her, a hospital abortion committee, created under the statute as an agency of the state and controlled as to legal matters by defendant Bolton, denied her the right to have an abortion because she did not come within one of the three reasons specified by the statute. Because the criminal sanctions of the statute apply against doctors rather than pregnant women, Mary Doe's controversy as to the constitutionality of the statute cannot be resolved by her through a criminal action.

The daily action of hospital abortion committees in refusing physicians, under authority of the Georgia abortion statute, the right to perform abortions which they desire to perform in the conduct of their professional practice creates a substantial, immediate, real, and continuing controversy between such physicians and the state authorities responsible for the enforcement of the statute. And, as to both Mary Doe and appellant physicians, *Epperson v. Arkansas*, 393 U.S. 97 (1968), allows an overbroad statute prohibiting constitutionally protected conduct to be challenged without risking criminal prosecution.

This Court's jurisdiction of an appeal under 28 U.S.C.

§ 1253 from an order denying an injunction is not affected by the correctness of the district court's exercise of discretion in granting or denying the injunction.

II. *THE PROCEDURAL, RESIDENCE, AND ACCREDITATION PROVISIONS OF THE GEORGIA ABORTION STATUTE ARE UNCONSTITUTIONAL.*

A. This Court held in *Griswold v. Connecticut*, 381 U.S. 479 (1965) that the right of a married couple to use contraceptives for family planning is an aspect of a constitutionally protected right of privacy. Such right of familial privacy also includes the right to determine family size by terminating an unwanted pregnancy resulting from contraceptive failure, which right can not be unduly restricted by state statute without a showing of countervailing, compelling state interest. No such state interest was shown to justify the Georgia abortion statute. The asserted interest in fetal life, on the one hand, disregards the historical intent of Georgia abortion laws to preserve the health of women, and on the other, is refuted by the provisions of the statute itself which expressly allows abortions in the case of danger to the mother's health, possible malformation of the fetus, and rape. Maternal health is an irrational justification for the absolute prohibition of the statute because advances in medical science have made early abortions safer than bearing a child and because the existence of criminal restrictions on therapeutic abortions have resulted in illegal abortions on a scale sufficient to be a major health problem.

B. The initial defect in the Georgia abortion statute as construed by the district court is its vagueness. A statute that makes an abortion legal or criminal based

upon whether it was "necessary" in light of "the totality of circumstances," including the patient's emotional, economic, psychological, familial, and physical situation, is without a standard capable of objective determination and is therefore too indefinite to warn persons of the conduct proscribed. Additionally, the statute's incorporation by reference of purported "standards" promulgated by the Joint Commission on the Accreditation of Hospitals is an unlawful delegation of authority and further compounds the vagueness since no such standards dealing with abortions exist.

C. The procedure upheld by the district court is wholly lacking in adequate safeguards required by minimal due process requirements. The statutory hospital abortion committee is the decision maker as to whether a woman will receive an abortion, yet the woman has no right to make any presentation to the committee, to know the reasons on which the committee's decision is based, or to appeal an adverse decision. While this procedure lacks fundamental fairness as to all applicants, it further exposes to public opprobrium unmarried, pregnant women without any opportunity for a fair hearing.

Further, the time consuming and cumbersome procedures of the statute and its requirement that abortions be performed only in accredited hospitals effectively manipulate out of existence plaintiff's rights. Time is a critical factor for a woman asserting a right to terminate a pregnancy since only about four or five weeks are usually available for the safest methods. Despite this need for a prompt determination of rights, the statutory procedure requires action by no less than six doctors. This has resulted in the denial of some ap-

plicants' rights simply because of administrative delays in considering their cases.

The requirement that abortions be performed only in accredited hospitals is an overbroad restriction insofar as it is intended to promote public health because it eliminates all facilities, however well equipped they may be to perform safe abortion procedures, if they have not been in operation for one year, or do not maintain a radiology department, or nuclear medicine facilities or facilities for treatment of mass casualties. The irrational overbreadth of this accredited hospital requirement is shown not only by the safe experience in other states with clinic (as opposed to hospital) abortions but also by the absence in Georgia of any comparable limitation on much more dangerous operations such as open-heart surgery which can be performed in any licensed hospital whether or not accredited. The effect of this statutory overbreadth as a subtle means of restricting the right to abortion can only be appreciated by realizing that 105 of Georgia's 159 counties have no accredited hospital at all.

D. The limitation in the Georgia abortion statute that only residents may receive legal abortions in the state violates the freedom to travel of all citizens of the United States. The concern expressed by the district court that Georgia might become the site of specialized abortion clinics (characterized as "abortion mills") is an inadequate answer to the statute's overbreadth since the rights of all travellers in the state are restricted regardless of their motives for being in the state.

E. Physicians who desire to recommend and perform abortions as dictated by their best professional judgment are denied the "liberty" to practice their profes-

sions and their "property" therein without due process of law. The possibility of criminal sanctions and loss of license prevents a physician from making an impartial medical decision as to the advisability of an abortion. This legally induced conflict of interest also exists to preclude a fair judgment by the hospital abortion committee. Such bias in making a medical decision and the requirement of concurrence by at least four other physicians are arbitrary restrictions since they apply to no other medical procedure however dangerous.

F. Statistical information shows that the Georgia abortion statute has had an invidiously discriminatory effect against poor, Negro, and rural citizens. The cost of a procedure requiring the services of at least six doctors and the limitation of abortion services to accredited hospitals available in only about a third of the counties in the state have heavily weighted the statute in favor of the well-to-do. Studies of the operation of the Georgia abortion statute by the Georgia Department of Health and the United States Public Health Service indicate that eight white women have received an abortion for every Negro woman despite the fact that abortion mortality from illegal abortions is "increasingly a black health problem." In one category—unmarried women—the statistical likelihood of white women receiving abortions is 25 times higher than black women. The district court's summary dismissal of plaintiff's claim of unequal protection of the law in reliance on *Dandridge v. Williams*, 397 U.S. 471 (1970), was incorrect, since the rights asserted were not merely economic interests but involve basic constitutional freedoms.

III. **THIS COURT SHOULD ORDER AN INJUNCTION AGAINST ENFORCEMENT OF THE GEORGIA ABORTION STATUTE OR RE-MAND TO THE DISTRICT COURT FOR A PROPER DETERMINATION OF THE INJUNCTION ISSUE.**

The rights of Mary Doe and persons in her class are denied them without their having any adequate remedy through defense of a criminal action. They are, therefore, without an adequate remedy at law. The very limited time available to any individual pregnant woman in which to assert her right to an abortion and the irreparable injury she will suffer represent special circumstances justifying injunctive relief against future prosecution under the statute.

A declaratory judgment in favor of only Mary Doe is inadequate since it leaves in operation the deterrent effect of the statute on doctors by allowing future state prosecutions.

The district court's reliance on *City of Greenwood v. Peacock*, 384 U.S. 808 (1968) in abstaining from considering the propriety of an injunction was in error, because that case, like this Court's recent case of *Younger v. Harris*, 401 U.S. 37 (1971), involved pending or immediately threatened prosecutions in state court. This case presents the situation in which potential federal-state frictions are at a minimum, and injunctive relief would actually prevent such friction.

ARGUMENT

I.

THIS COURT HAS JURISDICTION OF THIS "APPEAL . . . FROM AN ORDER DENYING . . . AN INTERLOCUTORY OR PERMANENT INJUNCTION . . ." 28 U.S.C. § 1253.

A. *The statutory jurisdictional requirements are clearly met.*

This appeal is based upon 28 U.S.C. § 1253 which provides:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

The complaint sought a declaratory judgment as to the constitutionality of the Georgia abortion statute, a law of general statewide application, and an interlocutory and permanent injunction restraining the enforcement, operation, and execution thereof. Thus, it was a "proceeding required by [28 U.S.C. § 2281] to be heard and determined by a district court of three judges." The district court by its order of August 24, 1970 (A. 71-86), expressly denied all injunctive relief (A. 85), denied all relief to all plaintiffs except Mary Doe (A. 80), and denied all relief as to the procedural provisions of the statute (A. 85). Thus this is an appeal "from an order denying, after notice and hearing, an interlocutory [and] permanent injunction. . . ."

Jurisdiction of this appeal is consistent with the recent cases defining the Court's jurisdiction under 28

U.S.C. § 1253. See, e.g., *Perez v. Ledesma*, 401 U.S. 82, 84 n. 1 (1971). Unlike a situation in which no order granting or denying an injunction is involved, *Gunn v. University Committee to End the War*, 399 U.S. 383 (1970), or one in which the party seeking appeal is not aggrieved as to the injunction issue, *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970), plaintiffs' appeal is properly brought to this Court because their prayer for injunctive relief was expressly denied. Cf. *Goldstein v. Cox*, 396 U.S. 471, 478-79 (1970).

B. *Ancillary jurisdictional considerations.*

1) *The controversy is justiciable.*

The existence and the actual or potential application of the Georgia abortion statute has effectively denied Mary Doe and plaintiff doctors, nurses, social workers, ministers, and counselors and the classes they represent the free exercise of their constitutionally protected rights so that as to each of these parties a real controversy exists.

In the case of Mary Doe, the abortion statute exercises its restraints through third parties. Although women who wish to terminate their pregnancies may not be prosecuted under the statute, they are the persons who are irreparably injured when doctors and counselors are inhibited by its criminal sanction. This happened to Mary Doe when she was denied an abortion by a hospital abortion committee acting under the authority of the Georgia abortion statute. Such denial of asserted constitutional rights occurs daily to women in the class represented by Mary Doe.¹ Their rights

¹ Appellants offered to substitute as additional parties plaintiff other pregnant women who had been denied abortions, but the district court held this unnecessary.

cannot be vindicated by asserting them as a defense in a state court criminal case, and it would be absurd to require the women to find and depend on a courageous doctor to assert her constitutional right as a defense to his criminal prosecution.

The situation here is similar to that in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), where a Wisconsin statute made it a crime for bartenders to sell alcohol to a person that had been "posted" by the police as an alcoholic. This Court had no difficulty finding a justiciable controversy between the plaintiff who had thus been stigmatized by being posted and the Chief of Police, although the plaintiff had not been threatened with prosecution. As in *Constantineau*, the power of the state here has in fact been asserted against Mary Doe by actions of a statutory hospital abortion committee in denying her an abortion.

The substantive constitutional rights asserted by appellant doctors, nurses, social workers, ministers, and counselors are more fully developed in a subsequent section of this brief. For purposes of considering justiciability, however, it is sufficient to note that these are the parties against whom the criminal sanctions of the Georgia abortion statute operate, either directly in the case of doctors and nurses or indirectly in the case of counselors through Georgia's conspiracy statutes, *Ga. Code* § 26-3201. While the district court correctly accorded all of the plaintiffs standing to challenge the Georgia abortion statute because of its alleged restriction on their right to practice their professions (A. 76), it found an insufficient "collision of interest" in the claims of all plaintiffs other than Mary Doe to make them justiciable, presumably because of the absence of

threatened prosecution of these parties (A. 80). This result, however, ignores two factors. As the district court noted in dealing with Mary Doe's claim, this Court has recognized the justiciability of a case involving an unconstitutional restraint upon fundamental liberties even though there has been no pending or threatened prosecution. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

By concentrating on criminal sanctions, the district court failed to properly evaluate the restraining effects of actions by the statutory hospital abortion committees on the rights asserted by plaintiff doctors and, to a more attenuated degree, on the rights of the other plaintiffs. Plaintiff Peter G. Bourne was one of the doctors who proposed the abortion for Mary Doe which was denied by the hospital abortion committee. (See Answers to Interrogatories to Mary Doe, A. 63). Every time a hospital committee exerts the power given it by the state to deny an abortion, its action not only deprives the applicant of her rights but also denies the rights asserted here by physicians and nurses—their right to practice their professions through the exercise of their best professional judgment free from the threat of criminal prosecution. The Georgia abortion statute is a clear example of the kind of situation discussed by Mr. Justice Brennan in his opinion in *Perez v. Ledesma*, *supra*:

[W]here a criminal statute prohibits or seems to prohibit constitutionally protected conduct, and to that extent is unconstitutionally vague or overbroad . . . the opportunity to raise constitutional defenses at a criminal trial is inadequate to protect the underlying constitutional rights, since in that situation a substantial number of people may well avoid the risk of criminal prosecution by abstain-

ing from conduct thought to be proscribed by the statute. Even persons confident that their contemplated conduct would be held to be constitutionally protected and that accordingly any state conviction would be overturned may be deterred from engaging in such conduct by the prospect of becoming enmeshed in protracted criminal litigation, and by the risk that in the end, years later, their confidence will prove to have been misplaced and their resources wasted. This deterrence is magnified by the scope that vagueness or overbreadth gives for discriminatory or capricious enforcement. Federal anticipatory relief is justified here because it is a principal function of the federal courts to vindicate the constitutional rights of all persons—those who want to obey state laws as well as those prepared to defy them. 401 U.S. at 118 (concurring in part and dissenting in part).

The statutory hospital abortion committees are agencies of the state, controlled as to legal matters by appellee Bolton. *Ga. Code* § 40-1614. See also the district court's opinion at (A. 73). Their daily determination of the rights of members of the appellants' classes alone creates a "substantial controversy . . . of sufficient immediacy and reality," *Golden v. Zwickler*, 394 U.S. 103, 108 (1969), the requisite "exigent adversity" for justiciability, *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Cf. *Crossen v. Breckenridge*, 40 U.S.L.W. 2016 (6th Cir. June 23, 1971).

2) *The district court's reasons for denying an injunction do not affect this Court's jurisdiction of the appeal.*

Normally whether to grant an injunction to effectuate a trial court's underlying holding involves an element of discretion. If the appellate court decides to

leave that exercise of discretion undisturbed, this does not affect the appellate court's jurisdiction. Therefore, consideration here of whether the declaratory judgment granted and the further declarations sought should be supported by injunctions is not properly jurisdictional. If an injunction is denied, § 1253 brings the appeal here without further ado. Appellants will discuss in a subsequent section of this brief the reasons the district court's denial of injunctive relief was error.

II.

THE DISTRICT COURT SHOULD HAVE DECLARED THE PROCEDURAL, RESIDENCE, AND ACCREDITATION PROVISIONS OF THE GEORGIA ABORTION STATUTE UNCONSTITUTIONAL.

- A. *The district court correctly held that the Georgia abortion statute unduly restricts a fundamental, constitutionally protected right to personal and marital privacy.*

This Court recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965) that the right of a married couple to use contraceptives for family planning is an aspect of a constitutionally protected "right of privacy older than the Bill of Rights . . ." 381 U.S. at 486. As the various opinions elaborately documented, a right of privacy has long been recognized, *Boyd v. United States*, 116 U.S. 616 (1886); *Union Pacific Ry. v. Batsford*, 114 U.S. 250 (1891), especially with regard to matters involving marriage, family, and sex, *Loving v. Virginia*, 388 U.S. 1 (1967) (freedom to marry a person of one's choosing); *Skinner v. Oklahoma*, 316 U.S. 535 (1952) (the right to have and rear children); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390

(1923) (the right to direct the education of one's children).

Beginning with *California v. Belous*, 71 Cal. 2d 996, 458 P.2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970), a number of state and federal courts² have found the right of privacy to include the decision to terminate an unwanted pregnancy.

² The federal cases include: *Babitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970) (per curiam); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *juris. postponed*, 91 S. Ct. 1610 (1971); *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971), *appeals docketed sub nom., Hanrahan v. Doe*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 1522, 1523). State trial court cases which have declared the abortion statutes of their states unconstitutional in criminal proceedings against doctors because of infringement on the woman's right of privacy include: *South Dakota v. Munson* (S.D. 7th Jud. Cir., Pennington County, Apr. 6, 1970) (Clarence P. Cooper, J.) (recognizing the woman's "private decision whether to bear her unquicken child"); *Michigan v. Ketchum* (Mich. Dist. Ct., Mar. 30, 1970) (Reid, J.) ("the statute as written infringes on the right of privacy in the physician-patient relationship, and may violate the patient's right to safe and adequate medical advice and treatment"); *Pennsylvania v. Page*, Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County, July 23, 1970) (Campbell, P. J.) ("the abortion statute interferes with the individual's private right to have or not to have children"); *California v. Gwynne*, No. 173309 (Calif. Mun. Ct., Orange County, June 16, 1970) (Thomson, J.); *California v. Barksdale*, No. 3323C (Calif. Mun. Ct., Alameda County, Mar. 24, 1970) (Foley, J.) *aff'd on appeal*, ____ Cal. App. 2d ____ (1st Div. July 22, 1971); *California v. Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct., Orange County, Jan. 9, 1970) (Mast, J.); *Illinois v. Anast*, No. 69-3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, J.) (holding the Illinois abortion statute "unconstitutional (1) for vagueness; and (2) for infringing upon a woman's right to control her body"). *Contra, Corkey v. Edwards*, 322 F. Supp. 1248 (W.D. N.C. 1971), *appeal docketed*, ____ U.S.L.W. ____ (U.S. ____, 1971) (No. ____); *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970); *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010); *United States ex rel. Williams v. Follette*, 313 F. Supp. 269, 272-73 (S.D.

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As discussed by Mr. Justice Clark in *Religion, Morality and Abortion: A Constitutional Approach*, 2 LOYOLA U. (L.A.) L. REV. 1 (April, 1969), if the right of familial privacy protects a decision to limit one's family by use of contraceptives from state interference, it must equally protect the right to determine family size by terminating an unplanned or unwanted pregnancy resulting from contraceptive failure.

The district court reached this conclusion with respect to Mary Doe, stating that the "concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy" and that insofar as the Georgia abortion statute limited the reasons for abortion, it "unduly restricts a decision sheltered by the constitutional right of privacy." (A. 84)

The state never disputed the existence of this fundamental right of privacy but urged that it had a counter-vailing compelling interest in regulating the right arising from its concern for the "legal rights" of the fetus, including the "right of the fetus to be born." ³ This po-

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N.Y. 1970) (questions substantial, but habeas corpus petitioner-physician remitted to state courts); *Doe v. Randall*, 314 F. Supp. 32 (D. Minn. 1970), *appeal docketed sub nom., Hodgson v. Randall*, 39 U.S.L.W. 3115 (U.S. Sept. 29, 1970) (No. 728), *on appeal from No. 42652* (Minn. Sup. Ct., July 20, 1970), *denying prohibition to No. 23789* (Minn. Dist. Ct., Ramsey County, June 29, 1970).

³ The state relied primarily on property and tort cases which hold that an unborn child may recover for torts inflicted prior to birth if born alive or may inherit property if born alive. These cases show a purpose to protect property interests *if the child is born alive* but really have little relevance to the claim of a right to be born. Unlike many states, Georgia has no statute which defers the execution of a death sentence in order that a convicted pregnant woman may deliver.

sition of the state, however, conveniently ignores the historical context from which the statute developed and is logically inconsistent with the provisions of the statute dealing with the asserted "rights" of some fetuses. Under the 1865 predecessor⁴ of the Georgia abortion statute, abortions were not criminal if performed to "preserve the life" of the mother. The present Georgia abortion statute,⁵ passed in 1968, added more grounds for legal abortion, *e.g.*, health, rape, fetal malformation.

Thus, throughout the history of Georgia's legal control over abortions, the "rights" of the fetus which the state now asserts have not been given first consideration.

Even assuming a compelling state interest, the state's statute does not attempt to accomplish it with the requisite "precision," see, *e.g.*, *Kramer v. Union Free School District*, 395 U.S. 621, 632 (1969). If the interest is limited to preservation of life, including fetal life, then the 1968 statute, with its non-life considerations would not have been passed. If the state is attempting to protect the *quality* of life, then the statute is woefully inadequate. It is more physically and emotionally damaging to bring a child into Mary Doe's family—poverty-stricken, fatherless, children not cared for or desired—than into a comfortable (albeit somewhat strained) family as a result of a consensual statutory rape.

Nor can the state find a compelling reason to justify its restriction of a fundamental right in consideration of the mother's health. Although abortions were un-

⁴ *Ga. Laws* 1865-66 at 233 Cobb, and *Ga. Laws* 1876 at 113.

⁵ The 1968 statute is modeled after the AMERICAN LAW INSTITUTE, MODEL PENAL CODE (Tentative Draft No. 2, 1962).

doubtedly dangerous operations in the mid-1800's when Georgia's first abortion statute was enacted,⁶ statistical information conclusively establishes that advancements in medicines and medical techniques⁷ now actually make it safer for a woman to have a medically induced abortion than to bear a child.⁸ Considering the shock-

⁶ See *California v. Belous*, *supra*, for a discussion of the historical development of the law; see also Perkins, *CRIMINAL LAW* p. 101 (1957); Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 419-22 (1968). That the early abortion statutes had a "health of the woman" history can best be seen by early court interpretations, e.g., *New Jersey v. Murphy*, 27 N.J.L. 112, 114 (1849), where it was stated that the purpose of the statute "... was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts."

⁷ Conditions today for performing an abortion are vastly different from those prevailing in 1865. In addition to the availability of antibiotics developed in the 1940's, perfection of the curettage method of early abortion (dilation curettage) and other recent advances in medical techniques have increased the safety of the procedure. A device was only recently developed for use in abortions during the first trimester of pregnancy; it is called a suction curettage or vacuum aspirator. The device dilates the cervix by vibration and aspirates the contents of the uterus. It has been further improved by the addition of the flexible plastic cannula which does not require dilation of the cervix for aspiration. The procedure takes about three minutes and is done on an outpatient basis either in hospitals or in "free standing" clinics. Patients are able to leave the clinic about one hour after the procedure. Peretz, *Evacuation of the Gravid Uterus by Negative Pressure (Suction Evacuation)*, 98 AM. J. OBST. & GYNEC. 18 (1967); Vojta, *A Critical View of Vacuum Aspiration: A New Method for the Termination of Pregnancy*, 30 OBSTETRICS AND GYNECOLOGY 28 (1967); MODERN HOSPITAL, Oct. 1970 p. 43.

⁸ Mortality associated with medically induced abortion for New York City for the first eleven months under its new law was 6.0 per 100,000 abortions, *Abortion Mortality*, 20 MORBIDITY AND MORTALITY 208, 209 (July 12, 1971) (U.S. Department of Health, Education and Welfare, Public Health Service). This is only slightly higher than the rates of Japan, 4.1; Czechoslovakia, 2.5; and Hungary, 1.2, where abortion has been legal and prac-

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ing number of deaths and complications resulting from the illegal "coathanger" abortions which are the necessary corollary of the existence of legal restrictions on therapeutic abortions, the state can hardly argue that the health of its citizens is promoted by the Georgia abortion statute.⁹ In light of the comparative mortality resulting from modern abortion techniques and that of maternity, a statute which requires a woman to carry an unwanted pregnancy to term infringes not only on a fundamental right of privacy but on the right to life itself.¹⁰

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 ticed for several years. C. Tietze, *Mortality with Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING 6 (1969). "Maternal mortality from complications of or associated with pregnancy, childbirth, and the puerperious, excluding induced abortion 20 deaths per 100,000 pregnancies, based on the United States rate of maternal mortality, excluding abortion, [which] was 18 per 100,000 live births in 1964-66." *Id.*

⁹ In Georgia alone there were 205 reported deaths from 1950 to 1969 resulting from illegal abortions; the extent of unreported deaths is unknown. R. Rochat, C. Tyler and A. Schoenbucher, *An Epidemiological Analysis of Abortion in Georgia*, 61 AM. J. OF PUBLIC HEALTH 543 (1971) (hereafter Rochat).

¹⁰ The state did not contend that it had an interest in promoting a population increase. Nor could it easily do so in view of the Family Planning Services Act (*Ga. Laws* 1966, at 228; *Ga. Code* §§ 99-8101 *et seq.*) which directs state agencies not only to give family planning services, but also to distribute rhythm charts, drugs, contraceptives, and similar products for birth control and family planning. One of the products distributed by state agencies under the auspices of the act is the intrauterine device ("IUD"); the June 1971 issue of MCH MEMO published by the Georgia Department of Public Health states that 25,538 women have received IUD's under the Family Planning Services Act. Substantial medical opinion holds that the IUD may not be a contraceptive (an agent that prevents fertilization of the ovum) but an abortifacient (an agent that interferes with and prevents the growth of or implantation of a fertilized ovum). Andros, *Intrauterine Contraceptive Devices*, 40 POSTGRADUATE MEDICINE 739 (1966); Committee on Human Reproduction, *Evaluation of Intrauterine Contraceptive Devices*, 199 J. AM. MED. ASSN. 647 (1967); letter from W. A. Krotoski in 157 SCIENCE 1465 (1967).

- B. *The statutory standard resulting from the decision below is vague and ambiguous and gives no guidance by which proscribed conduct may be judged and thereby violates the due process guarantee of the Fourteenth Amendment.*

After the district court's deletion of the statutory reasons for abortion, it remains a crime for a physician to perform an abortion except when "based upon his best clinical judgment that an abortion is necessary." By its supplemental decision the district court indicated that the hospital abortion committee must also decide whether an abortion is "necessary" on the broader medical basis, namely, the totality of circumstances surrounding each patient. (A. 163)

The "necessary" in light of "the totality of circumstances" test is so vague and indefinite that it does not warn physicians of what conduct is proscribed. The statute is wholly without objective standards and, therefore, susceptible to diverse and arbitrary interpretation. Assuming the doctors will choose to err on the side of caution, the availability of abortions will be arbitrarily circumscribed.

The Court has characterized the term "necessary" standing alone as an indefinite standard. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 517-18 (1926). In the recent decision of *United States v. Vuitch*, 400 U.S. 813 (1971), "necessary" was given constitutionally adequate meaning by being limited by a relationship to an abortion applicant's "health." Here, however, the district court has characterized the decision to terminate a pregnancy as a "personal-medical" decision to be based on all relevant factors, emotional, economic, psychological, familial, or physical. Note that of these, only one, i.e.,

physical, relates directly to health. The six doctors involved in any abortion decision are supposed to balance not only the health factor but such intangibles as whether a woman has had enough children, whether she is economically able to rear another child, whether another child will disrupt her familial situation, and what emotional response the woman will have toward an unwanted child. Obviously, a number of the now added factors in the decision-making equation are purely personal to the woman and inherently incapable of evaluation by a doctor's "best clinical judgment."

Appellants urge that a standard in a criminal statute based on *all* factors, including such intangibles as economic, emotional, and familial considerations, is equivalent to no standard at all and impossible of objective determination. The imprecision of "necessary" in light of "the totality of circumstances" standard is shown by the district court's own supplemental decision (A. 161) to prevent hospital abortion committees from adopting reasons or standards of the American College of Obstetricians and Gynecologists¹¹ as their standards. While such a standard as the district court's might be sufficient in the abstract for a course in medical ethics, the court below made it a test for determining criminal conduct, and for this purpose it is unconstitutionally vague.

¹¹ The American College of Obstetricians and Gynecologists standards previously permitted abortions for reasons similar to the Model Penal Code. In August 1970, the Executive Committee of the College adopted a more liberal policy of permitting the performance of an abortion based on the decision of a physician's recommendation or his patient's request. If the decision is based on the physician's recommendation then another physician is to be consulted; if based on patient request, then nothing more than a written request is necessary under the new policy, 14 A.C.O.G. NEWSLETTER 2 (Sept. 1970).

Another ambiguity involves what appears to be an attempt to incorporate, by reference, purported "standards" to regulate the abortion committee. The statute, *Ga. Code* § 26-1202 (b) (5), provides that the hospital abortion committee is to be "established and maintained in accordance with standards promulgated by the Joint Commission on the Accreditation of Hospitals. . . ." However, there are no such standards.¹¹ J.C.A.H. has adopted general hospital standards which regulate large hospitals' services and facilities, but they do not purport to establish any standards or guidelines on when an abortion may be performed. Thus the non-existence of standards purportedly incorporated in the statute creates another ambiguity.

Assuming, as one must, that the statutes will be applied in a criminal prosecution, there will be substantial difficulty for the doctor in convincing a jury that an abortion was "necessary." The jury may well second guess the doctor's judgment and weighing of factors (otherwise the statute would be meaningless). Presumably under authority of *Vuitch*, the burden would be on the state to prove that an abortion was not necessary.¹² Even though at first blush this would appear to be an

¹¹ See footnote 1 of the district court's supplemental opinion (A. 163); and Standards for Hospital Accreditation, J.C.A.H., Jan. 1, 1970. See also discussion of adoption of standards in *Doe v. General Hospital*, 313 F. Supp. 1170, 1172 (D.D.C. 1970). This delegation of authority is not unlike the delegation to the hospital abortion committee held to be unlawful in *Barksdale v. California*, ___ Cal. App. 2d ___ (1st Div. July 22, 1971).

¹² Consider additionally, how does a woman desiring an abortion go about convincing her doctor, two consultants and the hospital abortion committee that an abortion is necessary. This places on her an unwarranted burden of proof as a prerequisite to the exercise of a constitutional right. From the woman's standpoint, it can certainly be said that the statutory standard is now more restrictive than before the decision.

onerous burden, one cannot help but see that a jury would decide the question of the necessity of the abortion in the context of their own religious, social, and moral convictions. This statute, like the unconstitutionally vague inciting to insurrection statute in *Hernon v. Lowry*, 301 U.S. 242 (1936), permits the situation where "[t]he law, as thus construed, licenses the jury to create its own standard in each case." 301 U.S. at 261.

Here, as in the long line of first amendment vagueness-overbreadth cases, the doubly strict standard of specificity should apply, because the state is regulating in an area of fundamental rights. See, e.g., *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

C. *The procedure left intact by the district court denies due process to a woman seeking an abortion.*

1) *The abortion applicant has no opportunity to be heard, to know the reasons an abortion is denied her, or to appeal an adverse decision.*

This Court has reiterated many times in diverse situations that state action adversely affecting the life, liberty, or property of citizens cannot be accomplished by arbitrary fiat, but only in accordance with a procedural process appropriate to the rights and circumstances involved. *Bell v. Burson*, 401 U.S. 971 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961). Due process must be afforded whether the power of the state is exerted directly by its officers, by its courts, *NAACP v. Alabama*, 377 U.S. 288 (1964); by local police officers acting under its statutes, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); or by a committee which, while non-regulatory in form, acted in substance

as a repressor of protected rights, *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

These constitutional tenets were overlooked by the district court in its upholding of the procedural scheme contained in the Georgia abortion statute.¹⁴ Such an omission is especially inexplicable in light of the district court's unanimous finding that the decision to abort a pregnancy was included in a fundamental constitutional right of privacy. As was said in the dissent in *Cafeteria Workers*:

Such a result in effect nullifies the substantive right—not to be arbitrarily injured by Government—which the Court purports to recognize. What sort of right is it which enjoys absolutely no procedural protection? 367 U.S. at 900.

Women seeking abortions under the Georgia statute have an opportunity to talk with their own physicians and the two consulting physicians (if they have time and can afford it and if they don't insist on dealing solely with the physician of their choice), but no right to make any presentation, oral or written, to the ultimate decision maker—the statutory hospital abortion committee. Applicants cannot present facts or arguments on the issues which this decision maker may consider relevant and which, under the interpretation given the statute by the district court, now includes “all relevant factors, whether they be emotional, economic, psychological, familial or physical.” (A. 83) Indeed, applicants never see the committee or know the basis on which they are denied abortions even though the committee may have based its decision on a factor which is particularly within the knowledge of

¹⁴ The district court noted its concern over the Due Process issues (A. 85, n. 5), but chose to ignore them.

the applicant, *e.g.*, her economic or family situation. Nor does the applicant have any right under the statute to have an adverse decision of the abortion committee judicially reviewed. Considering the inexorable time requirements for safe abortions, it is difficult to imagine a procedure less suited for a fair determination of the fundamental constitutional right the district court recognized, especially for the indigent applicant financially unable to make the failsafe but expensive trip to New York if an abortion is denied her.

Goldberg v. Kelly, 397 U.S. 254 (1970), does not allow the scheme of the Georgia abortion statute. It teaches that while due process allows an informal procedure in appropriate circumstances, certain rights must be afforded the affected citizen—an opportunity to be heard by the decision maker directly and not merely through a written statement or secondhand presentation, to know and have an opportunity to counter the adverse facts against her, and to know the reasons on which the decision maker bases his judgment. If such fundamental rules must be observed before a driver's license may be revoked¹⁵ or before denying temporarily an indigent's "entitlement" to welfare payments, this Court cannot recognize less stringent rules for a woman's "entitlement" to the exercise of a recognized constitutional right.

Wisconsin v. Constantineau, *supra*, is also relevant to the issue of an opportunity to be heard since there this Court held:

Where a person's good name, reputation, honor, or integrity are at stake because of what the gov-

¹⁵ *Bell v. Burson*, *supra*.

ernment is doing to him, notice and an opportunity to be heard are essential. 400 U.S. at 437.

While society's values have changed somewhat since Hawthorne's *Scarlet Letter*, it is still "a badge of infamy" in many minds to bear an illegitimate child. Under the procedures provided by the Georgia abortion statute, however, a hospital committee is free to deny an abortion for unstated reasons without explanation to anyone. There is no safeguard against the possibility of an abortion being denied principally on the basis of the personal views of the committee's members as to the appropriate punishment for extra-marital sex relations. A recent statistical study suggests that such undisclosed motivations may well be at play.¹⁴ Cf. the intimation by defendants that they believe a criminal record to be relevant to a woman's right to an abortion. (A. 56) The unwed woman, thus made to bear her badge of infamy, has received no process at all under the Georgia law. As was said in *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958), in a different but analogous context:

An ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of these freedoms.

¹⁴ L. Baker and M. Freeman, *Abortion Surveillance at Grady Memorial Hospital*, Center for Disease Control (U.S. Department of Health, Education and Welfare, Public Health Service), p. 11, June and July, 1971 (hereafter Baker and Freeman). This and other studies published by the Center for Disease Control may not be readily available to the Court. Accordingly, copies of these studies are being delivered to the Clerk and to opposing counsel with copies of this brief.

While the district court's opinion attempted (unsuccessfully) to give a standard so that abortions in theory are not granted or denied purely in the discretion of the abortion committee, it left intact a procedure which allows just such arbitrary discretion to be used in fact, since no one is allowed to know the reasons, if any, which motivate the committee. Indeed the district court itself felt compelled to admonish the abortion committee against the use of secret standards. (A. 163, n. 1) Appellants urge that the protection of fundamental liberties cannot be left to a procedural scheme so dependent on the unchallengeable integrity and subjective motivations of the decision makers.

2) *The procedure is so cumbersome, time consuming, and restrictive by reason of the requirement that abortions be performed only in accredited hospitals that it effectively manipulates out of existence plaintiffs' constitutional rights.*

The observation of this Court in *Harman v. Forsse-nius*, 380 U.S. 528, 540 (1965), that "Constitutional rights would be of little value if they could be . . . indirectly denied . . . [or] manipulated out of existence," should have been considered by the district court in evaluating the procedural scheme of the Georgia abortion statute as a whole. Any procedure regulating in the area of a fundamental constitutional right must be tailored carefully to fit the nature of the right and the circumstances surrounding its exercise. In the case of a woman seeking an abortion the principal factors which must be considered are time and availability of adequate medical facilities and personnel. But the Georgia abortion statute, as enacted and as interpreted by the district court, imposes substantial and irrational road-blocks with respect to both these crucial factors and

thereby effectively manipulates out of existence the constitutional rights of many Georgia citizens.

Time is critical in abortions because of its direct relationship to the risks involved to the mother's life. While abortions during the first trimester of pregnancy (first twelve weeks) involve a lower risk of mortality than does childbirth, every week that passes thereafter increases the risk of death. Mortality and complications from legal abortions are three times greater in abortions performed after the twelfth week of gestation.¹⁷ On its face, the Georgia requirement of consultation and concurrence of two doctors in addition to the woman's own physician, followed by approval of a three doctor hospital abortion committee is patently unsuited to the kind of prompt determination required to assure a safe exercise of the right involved. It makes a mockery of any attempt to justify Georgia's abortion statute as preservative of the life or death of women.

A recent study conducted by the United States Department of Health, Education and Welfare and the Georgia State Department of Health at Grady Memorial Hospital (the hospital which treats indigent residents of Fulton and DeKalb Counties, Atlanta area) substantiates the cumbersomeness of the procedure and its effect in denying women safe abortions to which they otherwise are entitled. This study¹⁸ showed that

¹⁷ Address by C. Tietze, Conference on Abortion Techniques, June 3, 1971, New York, *Early Complications of Abortions under Medical Auspices: A Preliminary Report* (paper published by The Population Council, 160 E. 88th St., N.Y., N.Y.); C. Tyler, J. Bourne, S. Conger, J. Kahn, *Reporting and Surveillance of Legal Abortions in the United States, 1970* (U.S. Department of Health, Education and Welfare, Public Health Service), Table 8 (hereafter Tyler).

¹⁸ Baker and Freeman, *supra*, n. 16 at 13.

for 54 percent of the abortion candidates the mechanics of the system itself forced their discontinuance of the abortion process. The median time for work-up was reported at 15 days. (Mary Doe waited 25 days for the Grady abortion committee to act on her request. See Answers to Interrogatories (A. 63-64)). At application 27 percent of the candidates were at least 13 weeks pregnant, but by the end of the work-up time a total of 56 percent of the applicants had become second trimester pregnancies requiring the higher risk saline injection technique.¹⁹ Since the committee's decision at Grady is in part based upon gestational age of the fetus,²⁰ some women were denied abortions simply because a decision was not reached early enough in their cases. In short, they were victims of a system over which they have no control. Their request for an early stage, safe abortion was denied because of administrative delays and, even if approved, their life and health were jeopardized by a second trimester, more complicated surgical procedure.

The statutory limitation of legal abortions to licensed, accredited hospitals is a further irrational requirement which effectively limits and in some cases prevents the exercise of the constitutional right of privacy. The accreditation referred to in the statute is that conferred by the Joint Commission on the Accreditation of Hospitals, a private non-governmental agency in Chicago, Illinois. This organization has "standards" by which it evaluates a hospital's facilities, services, administration, etc. Although there is no reference in the standards to abortion facilities or services, the Georgia statute requires all abortions to be performed in an "ac-

¹⁹ *Id.*, at 12.

²⁰ *Id.*, at 9.

credited" facility. Only a cursory perusal of the standards by which hospitals are accredited will reveal that they are wholly inapposite in determining whether a particular facility is capable of performing safe abortion services. First a hospital must have been in operation a year before it is eligible for accreditation. Thus new hospital facilities, regardless of how well equipped or staffed they may be for performing abortion services, are precluded. Further, the requirements for nuclear medicine facilities, radiology department, and mass casualty treatment facilities²¹ have no reasonable relationship to the service of an abortion facility. The accreditation requirement effectively eliminates the possibility of establishing specialized clinics in Georgia designed specifically to provide safe, inexpensive therapeutic abortions.

There is no rational basis for limiting abortion services, which in early pregnancy is a very simple, safe procedure, to accredited hospitals, particularly in view of the fact that there is no comparable statutory limitation applicable to more complicated and dangerous procedures such as neurosurgery, open-heart surgery, etc., which may be performed in any licensed hospital, whether accredited or not. Formerly the method in most common use for abortion was dilation and curettage (sharp curette), a surgical procedure requiring anesthesia. Today abortions by the suction curettage or vacuum aspirator device are widely available. This development in safe abortion technique together with revised, updated professional standards led the Commissioners on Uniform State Laws to draft a Uniform

²¹ Standards for Hospital Accreditation, J.C.A.H., Jan. 1, 1970. See also Leavy and Charles, *California's New Therapeutic Abortion Act*, 15, U.C.L.A. L. REV. 1, 5 (1967).

Abortion Statute " which does not contain the accredited hospital limitation. The "reform laws," patterned after the Uniform Abortion Act, adopted by Alaska, Hawaii, New York, and Washington " embody the concept of clinical services; the Washington statute provides for an accredited hospital or other medical facility approved for abortion by the State Board of Health. The other three states do not adopt the accredited hospital requirement. The experience in New York with clinical (as opposed to hospital) abortions illustrates the irrationality of the accredited hospital requirement in terms of protecting health. During the first eleven months of services under the new statute 150,269 abortions were performed in New York City alone. Of that number, 44,216 were non-hospital abortions, and there were no deaths from clinical abortions."

* The district court found that the state had an ade-

" Commissioners on Uniform State Laws, UNIFORM ABORTION ACT (2nd Tentative Draft, 1970).

" *Alaska Stat.* § 11.15.060 (1970); *Hawaii Rev. Stat.* § 453-16 (1970 Supp.); *N.Y. Penal Law* § 125.05(3) (McKinney 1970 Supp.); *Rev. Code of Wash.* § 9.02.060, 9.02.070, 9.02.080 (1970 Supp.).

" *Abortion Mortality*, 20 MORBIDITY AND MORTALITY 208 (1971). (U.S. Department of Health, Education and Welfare, Public Health Service). Another interesting lesson of the New York experience is that as legal abortions increase, deaths from illegal abortions decrease. There were seven deaths from illegal abortions after the new statute where there were 24 reported for the twelve months preceding the reform law. See also the study of two metropolitan areas in California: in the San Francisco Bay area where many abortions are performed (172 per 1000 live births in 1969), abortion related deaths decreased to none for 1969. In Los Angeles where relatively few abortions are performed (20 per 1000 live births) there were six abortion related deaths per 100,000 live births. G. Steuart & P. Goldstein, *Therapeutic Abortion in California*, 37 OBSTETRICS & GYNECOLOGY 510, 513 (1971). Again, any life-or-health-of-the-woman justification for the Georgia abortion law fails.

quate interest in guarding against the "establishment of transient 'abortion mills' " (A. 83) to justify the accredited hospital requirement, but it failed to indicate any reason why such facilities are different in kind from transient "tuberculosis mills," or "psychiatric mills" or any other clinic or hospital facilities directed toward the efficient performance of a limited range of medical procedures.

Plaintiffs do not suggest that Georgia cannot or should not adopt standards for licensing all medical facilities including those rendering abortion services. But plaintiffs do urge that the use of the accreditation standard has no rational relationship to the proper objectives the state seeks to accomplish, but instead simply adds an additional, irrational deterrent to the exercise by Georgia women of their constitutional rights. Even the least stringent of equal protection standards cannot support the nonsensical result of merely requiring a state license for a hospital that does open-heart surgery but requiring "accreditation" for a hospital to do an essentially non-surgical vacuum aspiration procedure.

Plaintiffs urge that the accreditation requirement goes beyond assuring quality of medical facilities, it delegates authority to select facilities in which abortions may be performed to a private organization, J.C.A.H., an organization not subject to any state controls or statutory objectives of the legislature. The state has no review power over J.C.A.H.'s adoption of standards which might apply to abortion. For example, J.C.A.H. could adopt a series of reasons or conditions precedent for abortions; these could even be contrary to the district court's decision below, however, under

the statute as presently written there would be no control over such legislative authority delegated to J.C.A.H. Plaintiffs contend that such is an unlawful delegation of state authority and a violation of due process. *McGautha v. California*, 91 S.Ct. 1454 (1971), *U.S. v. Grimaud*, 220 U.S. 506 (1911), *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The significance of the requirement that abortions be performed only in accredited hospitals lies in the fact that 105 of Georgia's 159 counties have no accredited hospital at all.²⁵ For many women in these counties, especially the indigent who are dependent on public health facilities, this "procedural" requirement effectively nullifies such rights as are purported to be given by Georgia and recognized by the district court.

That the procedural and accreditation requirements actually result in denial of access to legal abortions in Georgia can best be demonstrated by the number of women who go out of state for this health service. In 1970, 705 legal abortions were performed on Georgia residents in the state.²⁶ After the New York abortion law went into effect, from July 1, 1970 to December 31, 1970, 445 Georgia women received abortions in New York City²⁷ and 217 received abortions in upstate New York.²⁸ Thus, in the last six months of 1970 almost as many Georgia women received abortion services in New

²⁵ J.C.A.H. List of Accredited Hospitals (Jan. 1970).

²⁶ Tyler, *supra*, n. 17, Table 1.

²⁷ J. Kahn, *Legalized Abortion in New York City*, U.S. Department of Health, Education and Welfare, Public Health Service (Paper delivered at annual EDS Conference, April, 1971), Table 6. See n. 16, *supra*.

²⁸ *Report of Selected Characteristics on Induced Abortions Recorded in New York State, July 1-December 31, 1970*, N. Y. Health Department, Table 5. See n. 16, *supra*.

York as were rendered in the entire state of Georgia for the full year, i.e., 662 to 705.²² No information is available as to the additional Georgia women who received legal abortions in Washington, D. C., California, Kansas, England, and elsewhere.

When considered as a whole, the cumbersome and restrictive procedural scheme of the Georgia abortion statute is wholly inconsistent with the exercise of a fundamental constitutional right, even after granting due regard to such interests as the state asserts in limiting such right. If, instead of abortion, the right involved was that of a married couple to use contraceptives for family planning, this Court surely would not allow Georgia to require consultation with three doctors and submission to a committee of three more doctors before the right could be legally exercised. Add to this the additional requirement that contraceptives be obtained only by prescription from certain licensed physicians in certain cities in the state and the analogy to the Georgia abortion statute is complete. Such a procedure could not constitutionally be allowed to encumber and manipulate out of existence the right of privacy of married couples to plan their families. A comparable device cannot be allowed to have the same effect on the equally important right of privacy to plan families by terminating unwanted pregnancies.

D. The limitation of abortions to residents of the state is unconstitutional.

Ga. Code §§ 26-1202(b) (1) and (b) (2) require, as a condition precedent to abortion services, that the wom-

²² The district court's decision in this case was on July 31, 1970, so for five of those six months there were no substantive limitations on Georgia abortions.

an and her physician certify that she is a "bona fide resident of the state of Georgia." There is no exception permitting emergency treatment for a non-resident.

This Court recently restated its long-standing recognition of the right to travel as a fundamental constitutional right, stating that "... the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement..." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).³⁰ Consistent with this articulation, it could hardly be questioned that one has a right to travel to Maryland for medical services and residents of Maryland have the right to travel to Georgia for all medical services. Abortion services should be no exception. Or, if an exception is allowed, the burden is on the state to show that this inherently suspect classification serves some compelling state interest.³¹ The state has carried no such burden, although the district court did articulate an "undifferentiated fear or

³⁰ Some of the other positions and bases for the right to freely move about are in *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964) (due process rationale); *Kent v. Dulles*, 357 U.S. 116 (1958) (due process); *Edwards v. California*, 314 U.S. 160 (1941) (commerce clause); *id.* at 181-85 (Douglas and Jackson, JJ. concurring) (fourteenth amendment privileges and immunities); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871) and *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869) (art. IV § 2 privileges and immunities). Also there is Mr. Justice Washington's famous statement concerning the privileges and immunities clause in *Corfield v. Coryell*, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1825).

³¹ That the burden is on the state to "offer... justification," see *Kramer v. Union Free School District*, 395 U.S. 621, 633 (1969).

apprehension"¹¹ that Georgia would become the site of specialized abortion clinics (termed abortion mills) providing specialized medical services to out of state people. Underlying this line of reasoning is a precept that there is something evil about this health service, but since the state has actually sanctioned this service in some circumstances, it must not be evil *per se*. The state might argue that the purpose of the statute is to discourage those who would enter solely to obtain abortion services. In *Shapiro*, this Court noted that the statute there was not that narrowly drawn since it also resulted in denial of welfare benefits to other indigents. A statute designed to fence out indigents seeking higher welfare benefits was held to enforce an invidious distinction between claims of its citizens and violative of equal protection guarantees. The statute here is not narrowly drawn to fence out only those coming for abortion services and must be found constitutionally overbroad.

E. *The sanctions and restrictions of the Georgia abortion statute unreasonably interfere with the right of physicians to practice their profession and thereby deny them "liberty" and "property" in violation of the fourteenth amendment.*

Plaintiff physicians are obstetricians, gynecologists, psychiatrists, and general practitioners of medicine who assert that the Georgia abortion statute violates their fundamental right to practice medicine in accordance with their best professional judgment free from unreasonable state interference. These physicians allege that they are regularly called upon by patients seeking therapeutic abortions, that they have in a number of in-

¹¹ *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508 (1969).

stances determined that an abortion is the correct medical treatment, but that they have been restrained from performing or recommending such treatment by the penalties and procedural requirements of the Georgia abortion statute.

The restrictions of the statute operate at two levels against physicians. The threat of criminal penalties and loss of license prevent the physician from making an impartial medical decision as to the advisability of an abortion. If a doctor decides an abortion is necessary, he personally risks a great deal; if his decision is against an abortion, however unjustified such decision may be medically, no criminal penalties are involved. Thus the sanctions of the Georgia abortion statute deny the individual physician the right to give medical advice and perform medical procedures based only on his concern for the health and life of his patient. In no other area of medical practice is the physician's decision making process so infected by conflict of interest as a result of a state statute.

If a physician initially decides that an abortion is advisable, he meets the second level of restrictions of the Georgia abortion statute, namely, the requirement that two other physicians concur with his judgment and that a hospital abortion committee of three other doctors approve the abortion. As in the case of the individual physician, conflicts of interest make an impartial determination by the committee difficult since it is not clear under the statute whether the committee members are criminally liable if their judgment about the advisability of an abortion is subsequently challenged as being unauthorized by law. Whatever the motivations of the abortion committee members, the indi-

vidual physician desiring to perform an abortion in the exercise of his profession can be denied the right to do so without knowing the reasons for such denial.

In cases involving railroad conductors,³³ cooks,³⁴ lawyers,³⁵ teachers ³⁶ and scientists,³⁷ the right to conduct one's calling or profession free from arbitrary restrictions has been recognized as being an aspect of the "liberty" and "property" guaranteed by the fourteenth amendment. The threat of criminal penalties and the requirement of prior concurrence and unchallengeable approval contained in the Georgia abortion statute are such arbitrary restrictions since they are imposed on no other medical procedure, however dangerous, and are unrelated to any other rationally discernible state interest. As such they deny physicians their liberty and property without due process of law.

F. The Georgia abortion statute results in discrimination against poor and Negro citizens, denying them equal protection of the law.

Providing equal justice for poor and rich, weak and powerful alike is an age old problem. People have never ceased to hope and strive to move closer to that goal. *Griffin v. Illinois*, 351 U.S. 12, 16 (1956).

In considering whether equal justice has been afforded all citizens, this Court has recognized that invidious discriminations can occur by subtle means as well as by gross and that, however occurring, classifications which invade or restrain fundamental rights and lib-

³³ *Smith v. Texas*, 233 U.S. 630 (1914).

³⁴ *Truax v. Raich*, 239 U.S. 33 (1915).

³⁵ *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

³⁶ *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

³⁷ *Greene v. McElroy*, 360 U.S. 474 (1959).

erties cannot be sustained under the equal protection clause unless justified by compelling state reasons to which the classifications are reasonably related. *Shapiro v. Thompson, supra*; *Harper v. Virginia Bd. of Elections*, 383 U.S. 662 (1966); *Douglas v. California*, 372 U.S. 353 (1963).

Appellants contend that, although non-discriminatory in its express terms, the statutory procedures and restrictions and the administrative application of the Georgia abortion statute have produced invidious discriminations between rich and poor, black and white, and urban and rural citizens without rational justification. Appellants offered to present evidence in proof of such allegations but were denied an opportunity to do so by the district court. (A. 87, 129-132).

When read in the light of published facts and statistical studies, however, the discriminatory effects of the procedures and restrictions of the Georgia abortion statute are shown in clear relief. In theory any of Georgia's female citizens may obtain an abortion; but this is conditioned on a requirement of examination by three physicians and approval by a majority of a committee of at least three other physicians. It requires no evidence to show that such a procedure is initially weighted heavily in favor of those citizens capable of paying the fees of three physicians and the costs of a private hospital as compared to indigent citizens dependent on public health facilities, or even the wage-earner who is able to afford a single doctor, but not three of them.³³

³³ Scholarly commentary has reiterated the fact of extraordinary socio-economic discrimination inherent in the implementation of state abortion laws. For example a 1965 study by Robert E. Hall, M.D., of sixty major hospitals revealed that

(continued on page 48)

vidual physician desiring to perform an abortion in the exercise of his profession can be denied the right to do so without knowing the reasons for such denial.

In cases involving railroad conductors,³³ cooks,³⁴ lawyers,³⁵ teachers³⁶ and scientists,³⁷ the right to conduct one's calling or profession free from arbitrary restrictions has been recognized as being an aspect of the "liberty" and "property" guaranteed by the fourteenth amendment. The threat of criminal penalties and the requirement of prior concurrence and unchallengeable approval contained in the Georgia abortion statute are such arbitrary restrictions since they are imposed on no other medical procedure, however dangerous, and are unrelated to any other rationally discernible state interest. As such they deny physicians their liberty and property without due process of law.

F. *The Georgia abortion statute results in discrimination against poor and Negro citizens, denying them equal protection of the law.*

Providing equal justice for poor and rich, weak and powerful alike is an age old problem. People have never ceased to hope and strive to move closer to that goal. *Griffin v. Illinois*, 351 U.S. 12, 16 (1956).

In considering whether equal justice has been afforded all citizens, this Court has recognized that invidious discriminations can occur by subtle means as well as by gross and that, however occurring, classifications which invade or restrain fundamental rights and lib-

³³ *Smith v. Texas*, 233 U.S. 630 (1914).

³⁴ *Truax v. Raich*, 239 U.S. 33 (1915).

³⁵ *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

³⁶ *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

³⁷ *Greene v. McElroy*, 360 U.S. 474 (1959).

erties cannot be sustained under the equal protection clause unless justified by compelling state reasons to which the classifications are reasonably related. *Shapiro v. Thompson, supra*; *Harper v. Virginia Bd. of Elections*, 383 U.S. 662 (1966); *Douglas v. California*, 372 U.S. 353 (1963).

Appellants contend that, although non-discriminatory in its express terms, the statutory procedures and restrictions and the administrative application of the Georgia abortion statute have produced invidious discriminations between rich and poor, black and white, and urban and rural citizens without rational justification. Appellants offered to present evidence in proof of such allegations but were denied an opportunity to do so by the district court. (A. 87, 129-132).

When read in the light of published facts and statistical studies, however, the discriminatory effects of the procedures and restrictions of the Georgia abortion statute are shown in clear relief. In theory any of Georgia's female citizens may obtain an abortion; but this is conditioned on a requirement of examination by three physicians and approval by a majority of a committee of at least three other physicians. It requires no evidence to show that such a procedure is initially weighted heavily in favor of those citizens capable of paying the fees of three physicians and the costs of a private hospital as compared to indigent citizens dependent on public health facilities, or even the wage-earner who is able to afford a single doctor, but not three of them.³³

³³ Scholarly commentary has reiterated the fact of extraordinary socio-economic discrimination inherent in the implementation of state abortion laws. For example a 1965 study by Robert E. Hall, M.D., of sixty major hospitals revealed that

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The statute's further limitation that abortions be performed only in accredited hospitals is an additional deterrent to the poor, particularly in the rural areas of the state, since 105 of Georgia's 159 counties have no accredited hospital at all." Thus, the exercise of the "right" afforded by Georgia to have an abortion may well depend upon a citizen having the price of a bus ticket to a neighboring county.⁴⁰

Not surprisingly, a system so weighted in favor of those able to pay for the exercise of their rights has had a racially discriminatory effect in Georgia. A study by the Division of Maternal Health, Georgia Department of Public Health, and the United States Depart-

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the abortion/delivery ratio for private patients was 3.6 times higher than that for ward or poor patients. R. Hall, *Therapeutic Abortion, Sterilization and Contraception*, 91 AM. J. OBST. & GYNEC. 518, Table VI (1965).

"A statistical study of the operation of the Georgia abortion statute during its first two years indicates that hospital abortions were in fact performed only in 22 of Georgia's 159 counties, suggesting to the authors that "hospital abortions are most available to women residing within 100 miles of metropolitan Atlanta." R. Rochat, *supra* n. 9, at 547.

"Appellants do not suggest that Georgia is constitutionally required to make its law with respect to abortions as liberal as those of any other state. In considering the equal protection aspects of this case, however, plaintiffs think it not inappropriate to point out that abortion services have for some time been available to Georgia citizens who can afford the price of travel to New York or a number of other states and countries with less restrictive abortion statutes. More Georgia women had abortions performed out of state during 1970 than were performed in Georgia. Tyler, *supra* n. 17 at Figure I. The extent of the discrimination against the poor is dramatically illustrated by a report that it is actually cheaper to fly to New York for an abortion than to obtain one locally in Atlanta. See N. Y. *Abortions Are Easier, Georgia Women Discover—Less Costly, Too*, Atlanta Journal & Constitution, July 11, 1971 at 12-A, col. 1.

ment of Health, Education and Welfare, Public Health Service" as to the operation of the Georgia abortion statute from its adoption in 1968 through June 1970, shows that hospital abortions were performed for 408 white women but only for 53 Negro women in the state.⁴¹ This ratio hardly reflects relative needs for therapeutic abortion services because during the period 1965-69 Negro abortion mortality (from illegal non-hospital abortions) was 14 times greater than white abortion mortality.⁴² In the words of the authors, "Abortion mortality from non-hospital abortions in Georgia is becoming increasingly a black health problem: presumably, this reflects the lower socio-economic status of blacks in Georgia." If the more limited category of *unmarried* women is considered, this survey shows that "unmarried pregnant whites are 25 times more likely to receive a hospital abortion than unmarried pregnant blacks," although the latter group has had the highest abortion mortality over the years.⁴³

As discussed in another section of this brief, appellants can find no rational relationship between the requirement that abortions be performed only in accredited hospitals and a state interest in promoting health since the state allows major surgery of all kinds to be performed in its licensed hospitals whether or not accredited. Presumably the district court's conclusion that the state has an interest in protecting its citizens from the establishment of what it defined as dangerous "abortion mills" was founded on health considerations. But the district court failed to consider whether some al-

⁴¹ Rochat, *supra* n. 9.

⁴² *Id.* at 548, Table 7.

⁴³ *Id.* at 543.

⁴⁴ *Id.* at 548.

ternative device, short of limiting abortions to accredited hospitals, might not accomplish this health objective without having a discriminatory effect on poor and Negro citizens. Appellants challenged the existing Georgia abortion statute as being unconstitutional; it is no answer to this challenge to say that Georgia could establish some other procedure which would meet equal protection requirements. Yet this is exactly the answer the district court gave in reliance on *Dandridge v. Williams*, 397 U.S. 471 (1970). The rights appellants assert, however, are not in the area of economics and social welfare, but arise under the freedoms guaranteed by the Bill of Rights and the Fourteenth Amendment. And appellants contended that the Georgia regulatory scheme is infected with a racially discriminatory effect. Cf. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

In these circumstances, statutory requirements which have effectively fenced out poor and black citizens from the exercise of the right can be justified only by a showing that they are essential to the achievement of a compelling state interest. *Shapiro v. Thompson*, *supra*; *Kramer v. Union Free School District*, *supra*. By this test, the tenuous relationship between the statute's cumbersome, costly procedures and restrictions of abortions to accredited hospitals and a state health interest cannot be justification for the invidious discrimination it has produced."

"Other equal protection considerations are involved in Ga. Code § 26-1202(e) which permits a hospital to elect not to perform abortions. It is recognized that individual doctors should have this right, as a matter of conscience, but hospitals are fictitious legal entities and not having a conscience as such can lay no claim to exemption for that reason. Public or quasi-public hospitals occupy "state action" status and have an equal pro-

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III.

THIS COURT SHOULD ORDER AN INJUNCTION AGAINST ENFORCEMENT OF THE GEORGIA ABORTION STATUTE, OR, ALTERNATIVELY, REMAND TO THE DISTRICT COURT WITH INSTRUCTIONS TO CONSIDER, UNDER CORRECT LEGAL STANDARDS, WHETHER AN INJUNCTION SHOULD ISSUE.

At least since *Ex parte Young*, 209 U.S. 123 (1907), there has been no doubt of the propriety of federal courts exercising the equitable remedy of injunction to prevent the future enforcement of state criminal statutes. While in *Younger v. Harris*, 401 U.S. 37 (1971), this Court emphasized the kind of great and immediate, irreparable injury which must be shown before a federal court will intervene with equity powers in a pending state criminal prosecution, the majority opinion expressly stated no views "about the circumstances under which federal courts may act when there is no prosecution pending . . ." 401 U.S. at 41.

The operations of the Georgia abortion statute on plaintiffs and persons in the classes they represent create the kind of unusual situation and irreparable injury which justify an injunction. First, this regulatory scheme is self-operative against appellants without any need to

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tection "duty." Private hospitals receiving Hill-Burton or Medicaid funds would likewise be subject to equal protection responsibilities, cf. *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), cert. denied 376 U.S. 938 (1964). Further discussion of the hospital option provision is contained in the Amici Curiae Brief, pp. 48-52, filed in this case by National Legal Program on Health Problems of the Poor, National Welfare Rights Organization, and American Public Health Association.

impose its criminal sanctions in fact. The rights of persons in the class represented by Mary Doe are denied them, not because of any act on their part for which they could be subjected to criminal prosecution, but because they cannot find the magic combination of five doctors (the applicant's own physician, two consultants, and a majority of a three-doctor committee) willing to risk the criminal penalties of the statute. Indeed, even without the risk of criminal penalty, it is unlikely that in those counties with low population (and hence few doctors) that five doctors could be found to approve an abortion. In fact, not all counties even have five doctors. Thus as to persons in the class represented by Mary Doe, there is no meaningful way to test the constitutionality of the Georgia abortion statutes through state court criminal proceedings.

Second, the ephemeral time space in which the rights of pregnant women must be asserted, if they are to have any meaning for the specific individual involved, is another special circumstance justifying a remedy beyond declaratory judgment. Typically, pregnancy cannot be definitely established prior to the eighth week. The safest abortion techniques, however, are those used during the first twelve weeks of pregnancy.⁴⁴ Therefore, a woman has only about a month in which to complete the cumbersome and time consuming procedure required by the Georgia abortion statute if she is to be able to use the safest techniques. If, after following the procedure, a woman is aggrieved by an adverse decision of a hospital abortion committee, the possibility of seeking relief from any court, state or federal, is cold comfort; the time frame for judicial determination of

⁴⁴ Tietze, *supra* n. 8; Tyler, *supra* n. 17, Table 8.

rights simply does not allow ultimate resolution of the individual's rights in time to afford her an opportunity to exercise them.

These special circumstances—inadequate remedy at law and irreparable injury to the individual women represented by Mary Doe—justify, and appellants urge, demand injunctive relief against future application of the Georgia abortion statute to deny women in the class represented by Mary Doe abortions performed by qualified physicians.

The declaratory judgment granted by the district court, while correct insofar as it declared unconstitutionally overbroad the statutory reasons for abortion, is, standing alone, inadequate to protect the rights asserted by Mary Doe. The binding effect of the judgment on state enforcement officials in future cases is not certain. Therefore, the third party deterrent effect of the statute—criminal sanctions against doctors who participate in the exercise of the rights asserted by persons in the class represented by plaintiff Doe—remains in effect. *Babbitz v. McCann* (II), 320 F. Supp. 219 (E.D. Wis. 1970), *vacated and remanded*, 91 S.C. 1375 (1971), and other state criminal prosecutions set out above certainly illustrate that such a deterrent is not illusory. In *Babbitz*, the district court gave declaratory relief against the Wisconsin abortion statute, 310 F. Supp. 293 (1970), but denied injunctive relief upon the court's "expectation that the state courts would fully vindicate [a doctor's] federal constitutional rights. . . ." Thereafter, state authorities instituted criminal proceedings against Dr. Babbitz despite the declaratory judgment. The district court enjoined the state court proceedings; however, this Court vacated the judgment and remand-

ed the case for reconsideration in light of *Younger v. Harris*, *supra*.

The district court here did not make a determination as to the necessity for an injunction in light of the irreparable injury alleged by appellants, but, under the heading "ABSTENTION," denied an injunction, "on the same basis as such a prayer would be denied a state proceeding actually in progress. . . ." (A. 85) The court relied upon *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1968), quoting:

the vindication of defendant's federal rights is left to the state courts except in the rare situation where it can be clearly predicted . . . that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

Even ignoring the fact that *Peacock* is concerned with the totally inapposite remedy of removal, reliance on it was still misplaced, however, because it, like the *Younger* set of cases, deals with a situation in which state criminal prosecutions are pending and potential disruptions of the fine balance of the policies of federalism are the greatest. As this Court has recognized,^a

^a *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965). It should be pointed out that, as in *Dombrowski*, first amendment rights of free speech and expression are involved in this case in addition to a more broadly based and even more fragile right of privacy. Plaintiff physicians, nurses, ministers, social workers and counseling organizations alleged that the abortion statute interfered with their counseling women who sought their professional help in obtaining safe, speedy, and adequate medical abortions. Since abortions for economic, social and many physical and emotional reasons were prohibited by Georgia law, counseling persons as to where such an abortion could be obtained and assisting in arrangements were possible violations of the criminal conspiracy statute, *Ga. Code* § 26-3201, or such actions could make these plaintiffs accessories under *Ga. Code* § 26-801.

these policy considerations and the scope of 28 U.S.C. §2283 are not directly involved where there is no pending state court proceeding.

Congress clearly intended the federal courts to have general power to declare state statutes unconstitutional and to enjoin "the enforcement, operation or execution" thereof, 28 U.S.C. § 2281. And this Court has recognized that "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."⁴⁸

In view of this duty and the fact that the three-judge court did honor appellants' choice of a forum to the extent of granting declaratory relief on the merits of their asserted constitutional rights, it is inconsistent with sound judicial policy for the court to have stopped short of the injunction leaving the federal rights of persons in the classes represented by plaintiffs to be resolved piecemeal. If, despite all reasonable expectations, state officials undertake to prosecute a physician for violation of those portions of the Georgia abortion statute declared unconstitutional by the federal court, the court cannot then leave the matter to resolution by the state courts without demeaning its own judgment. Where, as here, no state criminal prosecution is pending or immediately threatened, potential friction in federal-state relations is at a minimum. Where the federal court has, in a novel and complex area of constitutional adjudication, declared a state statute unconstitutional, its failure to enjoin enforcement of the invalid statute simply invites friction. The tortuous progress of *Babbitz v. McCann*, *supra*, illustrates the potential

⁴⁸ *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

for needless trouble in *not* issuing the injunction. By the time the belated injunction issued, there was a pending state prosecution, casting doubt under *Younger* on the validity of the injunction.

CONCLUSION

The judgment of the district court should be reversed insofar as it found no justiciable controversy in the claim of appellant physicians, nurses, social workers, ministers, and family planning and abortion counselling organizations, and the opinion of this court should expressly declare invalid the Georgia abortion statute and direct the district court to enjoin the future enforcement thereof with respect to abortions performed by physicians duly licensed to practice medicine by Georgia law.

Respectfully submitted,

MARGIE PITTS HAMES
Suite 822, 15 Peachtree St., N.E.
Atlanta, Georgia 30303

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
American Civil Liberties Union
Foundation, Inc.
5 Forsyth Street
Atlanta, Georgia 30303

Of Counsel:

ELIZABETH ROEDIGER RINDSKOPF
GALE M. SIEGEL
185 Central Avenue, S.W.
Atlanta, Georgia 30303

TOBIANE SCHWARTZ
153 Pryor Street, S.W.
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I, Margie Pitts Hames, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, and on behalf of all Appellants, I served the foregoing Brief of Appellants on the Appellees by depositing copies of the same in a United States mail box, with first class postage prepaid addressed to counsel of record at their post office addresses:

Harold N. Hill, Jr.
Marion O. Gordon
Dorothy T. Beasley
Attorneys for Arthur K. Bolton
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Joel Feldman
Attorney for Lewis R. Slaton
Fulton County Courthouse
Atlanta, Georgia 30303

Henry L. Bowden
Ralph H. Witt
Attorneys for Herbert T. Jenkins
2614 First National Bank Building
Atlanta, Georgia 30303

This ____ day of August, 1971.

MARGIE PITTS HAMES
Attorney for Appellant